STATE OF MICHIGAN

COURT OF APPEALS

BETH ROSE,

Plaintiff-Appellee,

v

SHATZMAN & ASSOCIATES,

Defendant-Appellant,

and

MICHIGAN UNEMPLOYMENT AGENCY, f/k/a/ MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendant-Appellee.

UNPUBLISHED
November 3, 2000

No. 214207
Oakland Circuit Court
LC No. 96-533137 AE

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

Plaintiff, Beth Rose, worked as a legal secretary for defendant, Shatzman & Associates. On January 31, 1995, Shatzman & Associates terminated Rose's employment. Defendant, Michigan Employment Security Commission (MESC),[1] determined that Rose was not discharged for misconduct, and thus not disqualified from receiving unemployment benefits for misconduct under § 29(1)(b) of the Michigan Employment Security Act, MCL 421.29(1)(b); MSA 17.531(1)(b). Shatzman & Associates filed a request for redetermination, and claimed that Rose was not entitled to benefits because she was discharged for insubordination, poor attendance, and creating a hostile work environment. The MESC again found that Rose was not terminated for misconduct under the statute. Shatzman & Associates appealed to the MESC Referee Division. A referee determined that Shatzman & Associates had not

---

[1] The MESC is now the Michigan Unemployment Agency.

met its burden of proving misconduct under the statute. The MESC Board of Review and the circuit court affirmed. Shatzman & Associates appeals by leave granted. We affirm.

Shatzman & Associates challenges the referee's finding that it condoned Rose's use of profane language. It also contends that the referee's ruling was contrary to law and unsupported by competent, material, and substantial evidence. Finally, Shatzman & Associates argues that it presented sufficient evidence of misconduct when the isolated incidents are viewed collectively.

"This Court reviews a decision of an administrative agency in the same limited manner as does the circuit court." *Barker Bros Const v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995). "Agency findings of fact are conclusive [if supported] by competent, material, and substantial evidence on the whole record." *Id.*; MCL 24.306; MSA 3.560(206). This Court reviews "a decision by the MESC Board of Review to determine whether it is contrary to law or not supported by competent, material, and substantial evidence on the whole record, in which case [this Court] will reverse that decision." *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995). See MCL 421.38(1); MSA 17.540(1). "Substantial evidence is that evidence which reasonable minds would accept as adequate to support a decision. It is more than a mere scintilla but less than a preponderance of the evidence." *Korzowski, supra*, 213 Mich App 228.

An individual is not entitled to receive unemployment benefits if the individual's employment was terminated because of misconduct related to the job. MCL 421.29(1)(b); MSA 17.531(1)(b). The Michigan Employment Security Act disqualifies an individual from receiving benefits under such circumstances. The statute provides, in relevant part:

> An individual is disqualified from receiving benefits if he or she:
>
> * * *
>
> (b) Was discharged for misconduct connected with the individual's work or for intoxication while at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension. [MCL 421.29(1)(b); MSA 17.531(1)(b).]

"This Court has previously recognized that the Michigan Employment Security Act is remedial and was designed to 'safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment.'" *Korzowski, supra*, 213 Mich App 228-229, quoting *Tomei v General Motors Corp*, 194 Mich App 180, 184; 486 NW2d 100 (1992). Although the statute "generally is to be liberally construed, those provisions regarding disqualification from benefits are to be construed narrowly." *Korzowski, supra*, 213 Mich App 229. "Moreover, the employer bears the burden of proving misconduct." *Id.*

The Supreme Court adopted a definition of "misconduct" for purposes of § 29(1)(b) in *Carter v Employment Security Comm*, 364 Mich 538; 111 NW2d 817 (1961). This Court reiterated that definition in *Christophersen v City of Menominee*, 137 Mich App 776; 359 NW2d 563 (1984):

> . . . In *Carter v Employment Security Comm*, 364 Mich 538; 111 NW2d 817 [1961], the Supreme Court adopted the following definition of misconduct:
>
> > "The term 'misconduct' * * * is limited to conduct *evincing such wilful or wanton disregard of an employer's interests* as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." 364 Mich 541 [quoting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259-260; 296 NW 636 (1941)]. (Emphasis supplied.) [*Christophersen, supra*, 137 Mich App 779-780, quoting *Carter, supra*, 364 Mich 541 (emphasis in *Christophersen, supra*).]

"It is well established that excess absenteeism and tardiness for reasons not beyond the employee's control constitutes misconduct under MCL 421.29(1)(b); MSA 17.531(1)(b)." *Hagenbuch v Plainwell Paper Co, Inc*, 153 Mich App 834, 837; 396 NW2d 556 (1986), citing *Washington v Amway Grand Plaza*, 135 Mich App 652, 658-659; 354 NW2d 299 (1984).

In *Broyles v Aeroquip Corp*, 176 Mich App 175; 438 NW2d 888 (1989), in a matter of first impression, this Court held that the use of vulgar language can constitute misconduct. This Court stated:

> In looking at the use of vulgar or abusive language, we conclude that the use of such language can constitute employee misconduct. Certainly such conduct is wilful and deliberate since the employee can choose which words to use and, we believe, it violates the standards of behavior that an employer can reasonably expect from his employees. That is, we believe an employer has the right to expect his employees to act with a certain amount of civility towards management personnel and, for that matter, fellow employees. [*Broyles, supra*, 176 Mich App 178-179.]

This Court cautioned that the question whether the use of offensive language constitutes misconduct is to be evaluated based upon the totality of the circumstances. Evidence that the employer condoned the employee's use of vulgar or abusive language can militate against a finding of misconduct. This Court explained:

> . . . Rather, the totality of the circumstances of the case must be considered in determining if the use of vulgar or abusive language constitutes misconduct. Thus, we must look to the words used and the context in which the words are spoken in determining whether an employee has engaged in misconduct. In looking at the totality of the circumstances, various considerations should be taken into account. Whether the use of vulgar or abusive language constitutes misconduct depends upon a variety of

> factors, including considerations such as whether the words were directed at a fellow employee, a supervisor, or a customer, whether the tone and context suggests an abusive intent or friendly badgering, whether the comments were made in a private conversation or in the presence of others, *and whether such conduct has been condoned in the past*. [*Broyles, supra*, 176 Mich App 179 (emphasis added).]

Here, the length of Rose's employment is evidence that Rose's inappropriate behavior was condoned, which is a proper consideration in a determination of whether Rose's profane language constituted misconduct. *Broyles, supra*, 176 Mich App 179. The evidence showed that both Rose and Gerald Shatzman used obscenities in the common areas of the office. Shatzman admitted to regularly using the word "f--k" on numerous occasions, possibly on a daily basis. Sharon Bliss heard Shatzman use loud, offensive language in the office. Bliss testified that Shatzman called Rose a "f----r" and a "God D--n b---h." When Rose's conduct is examined in the totality of the circumstances, the referee's finding that Shatzman & Associates condoned Rose's behavior, and therefore, failed to show misconduct, was supported by competent, material and substantial evidence. The length of Rose's employment, and, indirectly, the evidence that Shatzman uttered similar obscenities in a loud voice and in the presence of others, suggest that Rose's inappropriate language was condoned, and militates against a finding of misconduct.

Shatzman & Associates also argues that even if Rose's use of obscene language did not constitute misconduct per se, when it is viewed in conjunction with Rose's poor attendance and insubordination, the referee's failure to find misconduct is unsupported by the evidence. We disagree. "[A] finding of 'misconduct' under the statute may be based on a series of derelictions and infractions, no one by itself rising to the level of 'misconduct.'" *Christophersen, supra*, 137 Mich App 780. Shatzman and Rachel Anger testified that Rose sometimes refused work from Shatzman. With regard to Rose's capability, Shatzman testified that "what she did do, she did [ ] very efficiently." Anger conceded that Rose "could be a very cooperative person" and "a good employee." Bliss described Rose's demeanor as "very professional." Rose admitted that she did not always drop what she was doing to attend to another matter when Shatzman requested her to do so. However, Rose testified that she never refused to perform work assignments and she never failed to complete her work in a timely fashion.

Shatzman stated that one of the reasons that Rose was discharged was her poor attendance. The record indicates that there were occasions on which Rose arrived late to work and left early. However, the frequency of these occasions is not clear. Rose testified that she was almost never late for work. Anger testified that after Shatzman warned Rose about her tardiness, she was generally punctual. The evidence was uncontroverted that Rose worked some evenings and Saturdays without pay. The frequency of those occasions is also not ascertainable from the record.

Based upon our review of the entire record, the referee's ruling was supported by sufficient evidence. As stated *supra*, the referee's findings must be supported by "competent, material, and substantial evidence on the whole record." *Korzowski, supra,* 213 Mich App 228. "Substantial evidence is that evidence which reasonable minds would accept as adequate to support a decision. It is more than a mere scintilla but less than a preponderance of the evidence." *Id.* The evidence is

consistent with a finding that Rose's conduct did not evince a wilful or wanton disregard of her employer's interests. We recognize that "[r]eviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency's choice between two reasonably differing views of the evidence." *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 128; 592 NW2d 408 (1998), quoting *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450; 473 NW2d 249 (1991).

We conclude that the evidence was subject to reasonably different views. Shatzman & Associates had the burden of establishing misconduct by a preponderance of the evidence. *Tuck v Ashcraft's Market, Inc*, 152 Mich App 579, 588; 394 NW2d 426 (1986). When the testimony is viewed in its entirety, we conclude that the referee did not err in concluding that Shatzman & Associates failed to meet its burden.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter